# ASSOCIATION REGULATORY STANDARDS TASKFORCE
# FINAL REPORT STATEMENT OF NEED RE. CGCC-8
# FEBRUARY 13, 2008

## I. INTRODUCTION

The California Gambling Control Commission (the "CGCC") submitted a draft proposed regulatory standard, CGCC-8, to the Tribal-State Association (the "Association") on July 11, 2007, prior to its adoption by the CGCC. The Association, in accordance with its adopted Protocol for Submission of Proposed State Regulatory Standards to the Association (the "Protocol"), created an Association Regulatory Standards Taskforce (the "Taskforce") to review CGCC-8. The Taskforce held its first meeting on Wednesday, August 8, 2007. The CGCC then submitted a revised proposed regulation to the Taskforce on September 7, 2007. Subsequent meetings were held on September 11, 2007, November 7, 2007, and January 9, 2008. These meetings were attended by a majority of the tribal regulators and representatives from the State of California (the "State").

The purpose of the Taskforce meetings was to discuss proposed criteria and information necessary to analyze and review the proposed regulation. Pursuant to the Protocol, the Taskforce is charged with providing a Statement of Need for the proposed regulation, including the rationale for the need based upon fact or policy. The Taskforce in developing this Statement of Need may consider the following: (i) economic impact on gaming operations, including whether the proposed regulatory standards impact small operations differently than large operations; (ii) whether the standard or policy embodied by these proposed regulatory standards is or will be applied to gaming facilities other than Indian casinos, such as card rooms and race tracks; if not whether there is any disparate impact or discriminatory effect created by the proposed regulatory standards; (iii) whether the proposed regulatory standards fosters uniformity; and (iv) alternatives to the proposed regulatory standards; (v) provide a statement of legal authority; (vi) if basis for regulatory standards is factual rather than policy based, address whether the proposed regulatory standards are duplicative. See Protocol for Submission of Proposed State Regulatory Standards to the Association, Amended January 21, 2004, Section (B)(2)(b).

In accordance with these duties, the Taskforce Chairman respectfully submits this final report and Statement of Need to the Association.

## II. STATEMENT OF NEED

The CGCC has cited different rationales for CGCC-8. One rationale cited in the regulation is that the *CRIT* decision[1] "changed the contours" of a basic Tribal-State Compact premise that regulatory jurisdiction lies with federal, state and tribal governments when it held that the National Indian Gaming Commission (the "NIGC") does not have the authority to promulgate or enforce Minimum Internal Control Standards ("MICS") for Class III gaming. (Section (a) of CGCC-8.)

[1] *Colorado River Indian Tribes v. NIGC*, 466 F.3d 134 (D.C. Cir. 2006).

However, the *CRIT* decision does not and cannot change the terms of the Compact. The State could have expressly addressed the inclusion of MICS in the original 1999 Compacts, but did not do so.[2] Nor was this done in subsequent amendments, as the State of Arizona did when it negotiated new Compacts with Arizona tribes in 2003. The 2003 Arizona Compacts expressly require gaming tribes in that state to implement MICS, as amended from time to time. The CGCC's attempt to adopt and enforce the NIGC MICS as statewide regulations is an improper attempt to amend the terms of the Tribal-State Compact in circumvention of section 12.1 of the Compact.

The CGCC also contends that its proposed regulation is needed "to preserve the benefits of independent oversight of Tribal MICS compliance" and "serve to increase public confidence that Tribal gaming meets the highest regulatory standards." CGCC-8, subdivision (a). However, the results of the Tribal Regulator Networking Group's survey demonstrate that the NIGC MICS remain the applicable standards for tribal gaming operations in California, notwithstanding the *CRIT* decision. Thus, the rationale that CGCC-8 is needed to maintain uniform MICS for tribal gaming operations in California is also invalid. (See also Section VI(A), (B) below, addressing the necessity of CGCC-8).

The rationale that the regulation is needed to address the *CRIT* decision also does not explain why CGCC-8 contains provisions requiring financial audits. The *CRIT* decision did not affect the role the NIGC plays with respect to financial audits or alter the existing requirements for annual external financial audits found in both section 8.1.8 of the Tribal-State Compact and Indian Gaming Regulatory Act of 1988 (the "IGRA")[3] at 25 U.S.C. § 2710(b)(2)(C). Since the regulatory scheme relating to annual financial audits remains untouched by the *CRIT* decision, there is no legitimate basis for including the financial audit provisions in CGCC-8.

**A. Economic Impact on Gaming Operations**

The provisions of CGCC-8 requiring adoption of the NIGC MICS and an annual "Agreed-Upon Procedures" audit would not pose a significant economic impact because, as stated above, these requirements are already enforced by Tribal Gaming Agencies. The requirement in CGCC-8 for an annual audit of the gaming operation's financial statements also does not pose a significant economic impact because this requirement is already found in the IGRA, gaming ordinances and the Tribal-State Compact.

However, the provisions of CGCC-8 authorizing the CGCC to conduct undefined "on-site compliance reviews" and requiring tribes to work with the CGCC to resolve any disputed findings of the CGCC's compliance review may pose a significant economic impact on tribal gaming operations, particularly for smaller tribal gaming operations. Costs include the staff time dedicated to producing records and escorting CGCC staff in conducting comprehensive reviews/audits in addition to the cost of audits already being performed. The unrestricted

[2] The absence of the MICS was a product of negotiations among the parties during the compacting process. See footnote 7.
[3] 25 U.S.C. § 2701 et seq.

compliance reviews contemplated by CGCC-8 could require a tribe to devote a great deal of staff time to responding to the state auditors and their findings.[4]

### B. Application to Card Rooms

The CGCC acknowledges that there are no MICS in place for non-tribal gaming facilities in California. Beginning in 2003, the State spent the better part of a year drafting MICS for the card rooms, eventually presenting them to representatives of the card rooms during a meeting in 2004. The reaction was decidedly negative as the State had not consulted with the advisory group of card room executives and attorneys, established for this very type of endeavor, during the year long drafting period and the final product revealed a concerning lack of understanding of MICS in general and how they should be applied to the card rooms. The State's MICS were a conglomeration of the NIGC' MICS and various statutes from Nevada and New Jersey. As of this report in 2008, *five years later*, no further MICS applicable to card rooms have been adopted.

CGCC-8's very existence thus represents a discriminatory approach to gaming regulation by the CGCC, which is all the more troubling because the CGCC has plenary jurisdiction to regulate non-tribal gaming facilities in California. Although the card rooms and tribal gaming facilities have in common some internal operations that inarguably require oversight – such as table games operations, currency drop and count and surveillance – the State does not require card rooms to implement MICS. Indeed, the State puts precious few requirements upon the card rooms such as a gambling license requirement, additional tables' requests and rules regarding third-party providers of proposition player services. This is *not* the case for tribal gaming operations, which have both federal and tribal oversight in addition to state oversight. The failure of the CGCC to impose MICS on non-tribal gaming facilities creates a true regulatory void and one that truly demands the State's immediate attention.

The fact that the CGCC has permitted non-tribal gaming facilities to operate without MICS for years but imposed such standards on tribal gaming operations almost immediately after the *CRIT* decision is telling. It suggests that the CGCC either ignores the fact that California tribes follow the NIGC MICS or does not respect the ability of tribal gaming agencies to enforce such standards, or both. It is disturbing that the State feels no urgency to exercise its unquestioned authority over the billion dollar a year card room industry and apparently feels compelled to impose an ill-advised and unnecessary regulation upon the tribal gaming facilities.

### C. Fostering Uniformity

CGCC-8 is not needed to foster uniformity because uniformity already exists. As noted above, a Tribal Regulator Networking Group survey shows that the NIGC MICS remain the minimum standards for California tribes despite the *CRIT* decision.

[4] In addition, the lack of experience of a newly formed agency conducting these comprehensive reviews/audits may increase the economic impacts.

It may be a little known fact that it was primarily Indian Tribes, including California Tribes, not the States that first supported the adoption of MICS to protect the integrity of Indian Gaming as well as the assets of the Indian Tribes in a uniform manner. Those Tribes who were members of the National Indian Gaming Association (NIGA) in the 1990s initiated what was termed a "MICS Work Group," and Tribes voluntarily offered the services of their professionals including internal auditors, accountants, gaming commissioners, gaming managers, attorneys, etc. to develop a model MICS to be used by any gaming Tribes, especially those Tribes who did not have the expertise and/or resources to develop their own MICS, so that those Tribes which were just starting out would have the ability to protect the integrity of their gaming operations. This NIGA MICS were used voluntarily by Tribes for many years, until the NIGC decided that they wanted to promulgate a Federal MICS. It is a well established fact that a large portion of the first MICS promulgated as a regulation by the NIGC was based primarily upon the product of that MICS Work Group.

In any event, the goal of fostering uniformity is not necessarily one that can or should be expected given the numerous varied Tribal-State Compacts that have been negotiated since the original 1999 Compacts. With respect to the issue of MICS in particular, the four most recently negotiated Compacts include Memoranda of Agreement ("MOA") under which those tribes have agreed to implement the NIGC MICS and to submit to enforcement and auditing by the State Gaming Agency. These concessions were arrived at through Tribal-State Compact negotiations. It is improper for the same requirements to be imposed in blanket fashion on all California gaming tribes under the auspices of a statewide gaming regulation when the MOAs stand as proof that such requirements are in the nature of Compact amendments.

### D. Alternatives to CGCC-8

Since circulating its first draft of CGCC-8 in late March 2007, the CGCC has met with strong opposition from tribal gaming regulators on a number of fronts. Most, if not all, Taskforce members questioned the need for the regulation because the State had (and still has) failed to show any deficiency with the status quo. Many Taskforce members also viewed the regulation as a wholesale amendment of the 1999 Compact – and thus the proper subject of renegotiations with the State – rather than an elaboration or clarification of what the Compact already permitted. Nonetheless, in the spirit of good faith, and in response to repeated requests by the CGCC, tribal gaming regulators and tribal attorneys proposed alternatives language to the objectionable portions of CGCC-8 as well as viable alternatives to the regulation itself. The proponents of these alternatives did not purport to speak on behalf of all or even most of the other members of the Taskforce, but hoped to spur discussions that would result in a compromise approach that most of the parties could live with.

The CGCC rejected not only the alternatives to CGCC-8 but also the proposed language that would have left the CGCC's version of CGCC-8 largely intact. A brief description of the proposed alternatives follows.

#### 1. No CGCC-8: maintain the status quo

The CGCC proposed CGCC-8 to address the supposed regulatory void created by the *CRIT* decision. Yet, despite repeated requests from Taskforce members, the CGCC failed to show – indeed, made no effort to show – that the State needed greater oversight. This is unsurprising because the existing practices of Tribal Gaming Agencies, coupled with the regulatory regime established by the existing Compacts, ensure that tribal gaming in California meets or exceeds the highest regulatory standards.

California Tribes have adopted the NIGC MICS as their own internal control standards, and submit to annual compliance and financial audits by independent licensed CPAs. These financial audits are submitted to the NIGC pursuant to federal regulations. In addition, Section 8.1.8 of the Compact requires Tribes to conduct "an audit of the Gaming Operation, not less than annually, by an independent certified public accountant, in accordance with the auditing and accounting standards for audits of casinos of the American Institute of Certified Public Accountants." Moreover, the Compact at Section 7.4 gives the State the right to ensure the independent audit has been conducted by inspecting Class III tribal gaming papers and records.

Tribes in California direct significant funds to fulfilling their role as the primary regulators under the Compact. The Rose Institute of State and Local Government projects tribal gaming commission annual budgets totaling $90,282,837, an average of more than $1.5 million per Tribe. *See* Study of Gaming Regulatory Agency Expenditures of California Tribes, September 2007 at page 5. *Id.* Surveyed Tribes employ 1,833 employees in their gaming agencies, with an average size of 32 employees per regulatory agency. *Id.* Comparing the regulatory budgets of California gaming Tribes and Nevada casinos, the Rose study determined that the Tribes spend more than six times what the Nevada operations spend per machine. *Id.* at page 6 ($1560.85 vs. $241.34).

The CGCC also stated that CGCC-8 would fulfill the objective of securing the State's share of the revenue under the Compacts. (See CGCC 4/6/07 Statement of Need). However, Compacts with percentage revenue sharing provisions already include specific audit provisions negotiated to enable the state to verify accurate payments. Other Compacts provide for flat fee payments to the State rather than payments by percentages based upon net win. CGCC-8 is not necessary for this stated purpose.

**2. <u>Individual Compact Amendments & MOAs</u>**

From the start, the CGCC's position has been that CGCC-8 does not create any new rights or obligations, but only fleshes out what the State is entitled to under the existing Compacts. Many Tribes disagree, viewing the CGCC's claimed authority to audit class III gaming operations, and to demand the adoption of MICS that equal or exceed those promulgated by the NIGC (to name just two), as the assertion of authority beyond what the Compact allows. Indeed, the State's recent renegotiation of some 1999 Compacts to expressly provide for such authority demonstrates that the State lacks such authority in the absence of Compact amendments. (See Discussion of Legal Authority below.)[5] Accordingly, the most obvious

[5] The State also has negotiated Compact amendments as a means to further its stated interests to confirm tribal gaming integrity and protect citizens. Under these amendments, patrons have the right to independently

alternative to CGCC-8 is for the State to initiate negotiations with each Tribe on a government-to-government basis and seek the new rights and obligations it desires through the Compact's amendment process.

In addition, some tribes have entered into Memorandum of Agreements (MOAs) with the State to provide for MICS adoption and audits by the CGCC. This is another alternative to CGCC-8.

### 3. Legislative Fix

Another alternative is waiting for the federal government to implement its own *CRIT* fix, which it has been pursuing since shortly after the *CRIT* decision. A federal fix would address the perceived lack of oversight necessitating CGCC-8, and once in place would render any claimed State authority redundant and burdensome. Since all Tribes are continuing to enforce minimum internal control standards that meet or exceed the NIGC MICS, there is no lack of regulation that warrants immediate action by the State.

### 4. NIGC Oversight Pursuant to Amended Gaming Ordinances

A number of California gaming tribes have amended their gaming ordinances to expressly incorporate the NIGC MICS and to vest the NIGC with authority to enforce tribal compliance with those standards. Other Tribes have indicated their intention to do the same. (Because the *CRIT* decision did not affect the NIGC's authority with respect to financial audits, or alter the existing independent financial audit requirements in Section 8.1.8 of the Compact and 25 U.S.C. §2710(b)(2)(C), and because gaming ordinances already provide for submission of these audits to the NIGC, the amendments would not need to address such audits.) These amendments to gaming ordinances remove the regulatory gap that the State perceives to exist as a result of the *CRIT* decision and the resulting NIGC oversight renders any claimed State authority unnecessary, redundant and burdensome.

### 5. Agreements between Individual Tribes and the State Gaming Agency

Many Tribes also have indicated a willingness to explore entering into MOAs with the State Gaming Agency, under which an individual Tribe would reaffirm its adherence to internal controls at least as stringent as those established by the NIGC and its willingness to enforce compliance with such standards (whether through its tribal gaming agency or an independent auditor) and to provide the CGCC with certification of that compliance on an annual (or other mutually agreed upon) basis.

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arbitrate disputes over the play or operation of a game if dissatisfied with the resolution of such dispute by management and the TGA. Gaming devices are tested to ensure fairness to patrons by the TGA, independent auditors, and the CGCC, and the results of the independent audit are provided to the CGCC.

### 6. Alternative Language to CGCC-8 Provisions

#### a. Rumsey Proposal

The Rumsey Tribal Gaming Agency submitted an alternative to the CGCC's proposed CGCC-8. Under the Rumsey proposal, each tribal gaming agency would maintain a System of Internal Controls ("SICs") that would equal or exceed the agency's established MICS. The CGCC, in turn, could ensure the Tribe's compliance with the SICs by conducting compliance reviews of the Tribe's gaming operation, including its table games (if applicable). The CGCC would then provide a written DRAFT report of its findings to the Tribe, which could either accept or dispute. Disputes that could not be resolved informally or by the full CGCC would then be subject to the dispute resolution process outlined in Compact Section 9.0.

#### b. Attorney Work Group Proposal

Circulated by a group of attorneys for a handful of Taskforce members, the attorney work group ("AWG") draft would have accepted many of CGCC-8's provisions, including the requirement that each TGA adopt MICS standards applicable to Class III gaming equal to or more stringent than those established by the NIGC. The AWG draft also would have acceded to the CGCC's desire for greater State oversight by agreeing to provide the State Gaming Agency with copies of the financial audits and MICS Agreed-upon Procedures Reports of the Tribes' Class III gaming operations performed by independent, California-licensed CPAs, as required under IGRA. Pursuant to this draft, the CGCC would also have access to the CPA's Agreed-upon Procedures work papers, the reports and work papers of the internal audit staff, CPA observation checklists, findings by the CPA and internal audit, any exceptions and responses to those exceptions.

Pursuant to this AWG draft, if the Agreed-upon Procedures Report failed to conclude that the gaming operation was in compliance with required written internal control standards, then audited corrective action plans were mandated with CGCC input into those plans. If the plans were not complied with, then the CGCC could conduct its own compliance audit.

The AWG also proposed a more detailed dispute resolution provision than the one suggested by the CGCC, which proposed that any disputes concerning the regulation would be "referred to the full CGCC for review and decision" and then, if necessary, resolved pursuant to the Compact's dispute resolution provisions. The AWG's proposed alternative regulation maintained the State's authority to decide a dispute initially, but would have allowed a Tribe to submit an adverse ruling to binding arbitration, followed by, if necessary, an action to enforce the arbitrator's award in a court of competent jurisdiction. If a Tribe refused to comply with an arbitrator's decision, the State could invoke the Compact's dispute resolution provisions.

Finally, the AWG proposed a Sunset Provision providing that CGCC-8 would not apply to any gaming operation over which the NIGC exercises jurisdiction to monitor and enforce Class III MICS, and that the Tribe would provide to the CGCC a copy of the report issued by the NIGC.

## E. Legal Authority

California does not have civil regulatory jurisdiction on Indian land absent a federal statute expressly conferring jurisdiction on the state. Public Law 280 did not confer such jurisdiction.[6] The only state civil regulatory jurisdiction that exists over a California Indian casino is through a Tribal-State Gaming Compact negotiated pursuant to IGRA. The Compact, at Section 8.2, expressly provides nothing therein affects the civil or criminal jurisdiction of the state under Public Law 280.

The CGCC cites to Compact Sections 8.4.1, 8.1.8, and 7.4 as the legal authority for CGCC-8. (*See* CGCC "Statement of Need for adoption of Regulation regarding Minimum Internal Control Standards (CGCC-8)," dated April 6, 2007). However, none of these Compact Sections provide legal authority for the requirements the CGCC seeks to impose on Tribes and Tribal Gaming Agencies through CGCC-8, which would require adoption of internal control standards at least as stringent as the federal MICS, submission of the financial audit to the CGCC, and submission to financial and MICS compliance reviews/audits by the CGCC.

The Compact at Section 8.4 provides for "regulations adopted by the State Gaming Agency in accordance with Section 8.4.1," which require Association approval. The purpose of such regulations is to "foster statewide uniformity of regulation of Class III gaming operations throughout the state" *so that* "*rules, regulations, standards, specifications, and procedures of the Tribal Gaming Agency* in respect to any matter encompassed by Sections 6.0, 7.0, and 8.0 shall be consistent" with that regulation adopted by the state pursuant to Section 8.4.1. Further, neither the State Gaming Agency nor the Association may adopt regulations that materially alter express provisions of the Compact or render any such provisions void or a nullity.

Section 8.1 states that the Tribal Gaming Agency is vested with the authority to, and must, promulgate rules, regulations or specifications ("rules") governing a series of topics, which do *not* include a requirement to adopt or enforce the MICS. There is no Compact provision that refers to the MICS.[7] Simply put, Section 8.4.1 does not authorize a uniform state regulation on the MICS because it is not a matter encompassed by Section 6, 7, or 8 of the Compact.

Moreover, even *if* the MICS had been included in Section 8.1, there is no legal authority to include in CGCC-8 a compliance review/audit of a casino's compliance with the MICS. Section 8.1 expressly provides "the Tribal Gaming Agency shall be vested with authority" to promulgate rules governing the topics in Section 8.1.1 through 8.1.14 and to ensure their enforcement in an effective manner. Section 8.1 is a recognition of Tribal Gaming Agency jurisdiction over these areas. *Nothing in Section 8.1 confers jurisdiction on the state to enforce*

[6] See Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360).

[7] The fact that the MICS was not included is no accident. At the time of the Compact negotiations, the National Indian Gaming Commission had promulgated federal minimum internal control standards, required tribes to adopt tribal standards that meet or exceed those federal standards, and enforced compliance with the foregoing. Also, while some tribes took the position that NIGC lacked jurisdiction under IGRA, California tribes adopted MICS and the NIGC actively enforced the MICS. Tribes continue to enforce tribally adopted MICS. The State does not have, and has never had, regulatory authority over these tribal MICS. Therefore, any State regulatory authority in this area must come about through Tribal-State Compact negotiations.

*the Tribal Gaming Agency rules pertaining to the gaming operation*. Compact Section 7.1 provides that it "is the responsibility of the Tribal Gaming Agency to conduct on-site gaming regulation and control in order to enforce the terms of this Gaming Compact."

The Compact could have directly required the gaming operation to comply with specified requirements on the subjects of Section 8.1.1 through 8.1.14 and could have provided state jurisdiction to enforce those requirements. Instead, the Compacts recognize the primacy of the Tribal Gaming Agency and in Section 8.1 expressly reserves to the Tribal Gaming Agency the authority over enforcement of compliance of the gaming operation with the rules it has adopted pursuant to Section 8.1.

Nor does Section 7.4 confer this jurisdiction. Under Section 7.4, the state may inspect gaming facility Class III records where reasonably necessary to ensure compliance with the Compact. Section 7.4 cannot be read to negate Section 8.1, which expressly provides for Tribal Gaming Agency's authority and jurisdiction for enforcement. Instead, Section 7.4 authorizes the state to review the rules governing the subjects of Section 8.1.1 through 8.1.10 to ensure such rules are in place and to review whether the Tribal Gaming Agency has a mechanism in place to ensure enforcement in an effective manner. Indeed, the State Gaming Agency has been conducting this type of compliance review for years through the California Department of Gambling Control (now the Bureau). The CGCC also recognized the limitations in the 1999 Compacts when it asserted in its budget change proposal for fiscal year 2006-2007 that the state has "restricted access to financial reports and information related to internal controls over gaming devices and gaming device revenues. California has limited Compact authority."[8]

In short, Section 7.4 and its subsections do not authorize the CGCC to establish minimum internal control standards for tribal gaming operations, do not authorize the CGCC to mandate that Tribal Gaming Agencies submit copies of tribal internal control standards and annual audits (financial or MICS-related) to the CGCC, and do not authorize the CGCC to conduct the comprehensive and unrestricted compliance reviews contemplated under CGCC-8, or require Tribes to engage in steps to address the CGCC's review findings.

Finally, Section 8.1.8 requires the Tribal Gaming Agency to adopt a rule requiring an independent CPA to conduct a financial audit at least annually and to ensure enforcement in an effective manner. Since these sections clearly establish the Tribal Gaming Agency as the responsible authority for regulating the annual independent financial audit of the tribal gaming operation, Section 8.1.8 does not provide legal authority for the CGCC to require submission of the financial audit report or to conduct compliance reviews/audits of the financials or of audited financial statements. In fact, the Compacts contain specific audit provisions for the State to verify revenue share, which clearly would have been unnecessary if the financial compliance review/audit proposed by CGCC-8 was authorized under the Compact.

In sum, CGCC-8 cannot confer civil regulatory jurisdiction to the state that was not conveyed by the Compact. As such, CGCC-8 is an unauthorized extension of the state's authority under the Compact. In the absence of legal authority, the provisions of CGCC-8

[8] State of California Budget Change Proposal For Fiscal Year 2006-2007 submitted to Department of Finance, at page 1-8.

amount to material amendments of the Tribal-State Compacts. As such, they must be negotiated between the State and the Tribe pursuant to section 12.1 of the Compact. Indeed, the fact that the 1999 and 2004 Compacts do *not* authorize the state to require MICS adoption, submission of financial audits, or to conduct MICS and financial compliance reviews/audits is evidenced by new compacts and new memorandum of agreements specifically including these provisions.

**F. <u>Duplicative</u>**

In his letter of March 30, 2007 to the U.S. Senate Committee on Indian Affairs ("Committee"), Governor Schwarzenegger told the Committee that "[California's] approach with the compacts and state oversight of internal controls has been to complement, rather than duplicate, NIGC's activities." CGCC-8 is entirely inconsistent with the Governor's unequivocal message to the Committee.

CGCC-8 is needlessly duplicative in several respects. As stated above, the *CRIT* decision did not alter the existing federal requirements for annual external financial audits found at 25 U.S.C. § 2710(b)(2)(C) or affect in any way the NIGC's regulatory authority over the conduct and results of such audits. Section 8.1.8 of the 1999 Compact (and comparable sections of the new or amended Compacts) place the responsibility for conducting the annual outside audit on the Tribal Gaming Agency[9], an approach consistent with the federal requirement. Thus, the financial audit requirements contemplated by CGCC-8 are already in place, with NIGC oversight, and would be entirely duplicative of existing tribal and federal activities.

Additionally, the initial "Statement of Need" for CGCC-8 stated that the proposed regulation would "guarantee that [the State's] interest in the revenue sharing that is a part of each compact is secure." However, all Compacts with percentage revenue sharing provisions already include specific audit provisions negotiated to enable the state to verify that such tribal payments are accurate. (See, for example, sections 5.3(c) and (d) of the 1999 Compacts.) Thus, these provisions of CGCC-8 needlessly duplicate existing Compact requirements.

With respect to its MICS-related provisions, CGCC-8 is duplicative in that tribes already have in place standards at least as stringent as the NIGC MICS, and these standards are enforced by Tribal Gaming Agencies. In addition, in recent weeks a number of California gaming tribes have amended their Tribal Gaming Ordinances[10] to expressly incorporate the NIGC MICS. By so doing, those tribes have granted the NIGC authority to monitor and enforce tribal compliance with those standards, up to and including the authority to close non-conforming facilities, under 25 U.S.C. § 2713 and 25 CFR pt. 542.3(g). The first of these ordinance amendments were approved by the Chairman of the NIGC, and went into effect, in January, 2008. A number of

[9] Section 2.20 of the 1999 Compacts, and similar sections of the new or amended compacts, define "Tribal Gaming Agency" as the person, agency, board, committee, commission, or council designated under tribal law, including, but not limited to, an intertribal gaming regulatory agency approved to fulfill those functions by the National Indian Gaming Commission, as primarily responsible for carrying out the Tribe's regulatory responsibilities under IGRA and the Tribal Gaming Ordinance.

[10] Section 2.10 of the 1999 Compacts, and similar sections of the new or amended compacts, define "Gaming Ordinance" as a tribal ordinance or resolution duly authorizing the conduct of Class III Gaming Activities on the Tribe's Indian lands and approved under IGRA.

additional tribes have announced their intention to similarly amend their Gaming Ordinances in the near future.

With respect to these tribes in particular, and with respect to all tribes if and when Congress adopts "CRIT-fix" legislation, the MICS-related provisions of CGCC-8 needlessly duplicate tribal and federal regulatory activities with no offsetting benefit.

## III. Recommendation

For the foregoing reasons, the Association Regulatory Standards Taskforce recommends that the Association find that draft CGCC-8, as presented to the Taskforce for consideration, is unnecessary, unduly burdensome, and unfairly discriminatory. Accordingly, CGCC-8, as drafted, should not be adopted as a proposed regulation for presentation to the Association. Furthermore, if the draft proposed regulation is adopted and presented to the Association, the Taskforce recommends that the Association disapprove CGCC-8.